INSOL INTERNATIONAL

FOUNDATION CERTIFICATE

IN INTERNATIONAL INSOLVENCY LAW

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 1

(INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW)

This is the **summative (or formal) assessment for Module 1** of this course and is compulsory for all registered candidates on the Foundation Certificate. The mark awarded for this assessment will determine your final mark for Module 1. In order to pass this module you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment1summative]**. An example would be something along the following lines: 202223-363.assessment1summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student ID allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6. The final submission date for this assessment is **15 November 2023**. The assessment submission portal will close at **23:00 (11 pm) GMT on 15 November 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **11 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one **that makes the most sense and is the most correct**. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The meaning of the word "bankruptcy" has a historical root pertaining to the "rupture" of a banking system. Select from the following the **best response** to this statement.

(a) This statement is untrue because the word bankruptcy does not have any historical roots and is a modern phrase.

(b) This statement is untrue since the word "bankruptcy" is believed to derive from non-English origins and has a historical root from destroying a vendor's place of business.

(c) This statement is true, although the word "bankruptcy" is not an English phrase.

(d) The statement is true and the phrase "bankruptcy" is believed to have been first adopted in England in the 12th century.

Question 1.2

Which of the following **best describes** an "executory contract" and its enforceability?

(a) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which remains incomplete as to its performance as at the time of bankruptcy / insolvency. An insolvency representative might not proceed with an executory contract if it is onerous or unprofitable. There may be special legal rules which govern specific types of executory contracts.

(b) An executory contract is a type of contract entered into by the executive officers of a debtor company. It will normally be completed by the insolvency representative in accordance with its terms, although there may be special legal rules which govern specific types of executory contracts.

(c) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which becomes complete upon the event of bankruptcy / insolvency of the debtor. An insolvency representative may disregard any type of executory contract.

(d) An executory contract is a contract entered into by a debtor and another party, or other parties, prior to the occurrence of bankruptcy / insolvency which may generally be disclaimed by an

insolvency representative upon the occurrence of bankruptcy / insolvency unless it is an employment contract.

Question 1.3

A German court has issued a judgment in a German insolvency which has a connection with England. The foreign insolvency office holder seeks recognition and enforcement in an English court of the insolvency order made in the German insolvency proceedings.

Which of the following statements, concerning the request for recognition and enforcement in England, is **true**?

(a) The English Court hearing the request for recognition and enforcement may apply the EU Recast Insolvency Regulation (2015).

(b) It is a relevant factor for the English Court hearing the matter to consider whether Germany has adopted the UNCITRAL Model Law on Cross-border Insolvency 1997, or not.

(c) The English Court will be able to consider the request based on its 2006 Insolvency Regulations (the adopted UNCITRAL Model Law on Cross-Border Insolvency) and / or common law principles.

(d) The German order will be automatically recognised in England due to a cross-border insolvency treaty between England and Germany.

Question 1.4

Unlike (former) continental insolvency rules, the English insolvency laws provided for a rather liberal discharge of debt provision since 1507. Select the **most accurate** response to this:

(a) This statement is correct since the English insolvency system was viewed as a pro-creditor system since its early development.

(b) This statement is correct since the English insolvency system, unlike continental systems, never provided for imprisonment for debt of insolvents and preferred to treat debtors in a humane way.

(c) This statement is incorrect since a statutory discharge of debt was only introduced in 1705 in England.

(d) This statement is incorrect since most of the continental insolvency rules provided for a liberal discharge of debt even before English law considered the introduction of such a dispensation.

Question 1.5

Private international law may involve “hard law” treaties and conventions which become enforceable as part of a State’s domestic law. Choose the correct statement:

(a) The statement is untrue since treaties and conventions are “soft law”, not “hard law”.

(b) This statement is true because States become signatories and therefore bind themselves and affect their domestic law accordingly.

(c) This statement is true and is why there has been great success with treaties and conventions.

(d) This statement is untrue because treaties and conventions are public international law, not private international law.

Question 1.6

What principles did Chamberlain consider essential to good bankruptcy law? Select from the following the **best response** to this question:

(a) The supervision of creditors, the rights of creditors to control debtor's assets with minimal interference, and the investigation of debtor's conduct and circumstances which led to insolvency.

(b) Upholding the rights of creditors to assets, investigating and reporting on debtor conduct which led to insolvency, and holding trustees to high standards of care.

(c) The need for there to be independent examination of debtor's conduct and circumstances leading to insolvency, the need for trustees to maintain independence and avoid conflicts of interest, the right for creditors to control debtor assets with least possible interference.

(d) The need for independent examination of debtor's conduct and circumstances leading to insolvency, the appropriateness of creditors having control of debtor assets with least possible interference, the need for trustees to be subject to supervision and audit.

Question 1.7

England, Australia and the United States of America (USA) each have their own respective single unified piece of insolvency legislation that applies to both personal and corporate insolvency. Select from the following the **best response** to this statement:

(a) This statement is true since England has the unified 1986 Insolvency Act, Australia has the Insolvency Act of 2001, and the USA has the 1978 Bankruptcy Code. Each of these Acts cover personal and corporate insolvency.

(b) This statement is untrue since in England the Insolvency Act 1986 deals only with personal insolvency.

(c) This statement is untrue because the USA has separate Acts dealing with corporate liquidation and rescue.

(d) The statement is untrue because Australia has separate Acts dealing with corporate insolvency and personal bankruptcy.

Question 1.8

African nations all incorporate aspects of English insolvency law. Select from the following the **best response** to this statement:

(a) This statement is untrue since some African nations have English law tradition, but others are based on civil law tradition or a mixture of different legal traditions.

(b) This statement is untrue because African nations all have a civil law tradition.

(c) This statement is true because, while some may incorporate other legal traditions, every African nation is largely based upon English law due to colonial history.

(d) This statement is true because African States each chose to adopt English insolvency laws in modern times.

Question 1.9

To date, the most successful soft law approach to international insolvency law issues has been the Model Law on Cross-border Insolvency. Select from the following the **best response** to this statement:

(a) This statement is untrue because not all States have adopted the Model Law on Cross-border Insolvency.

(b) This statement is true because the Model Law on Cross-border Insolvency has been adopted by numerous States and is gaining momentum as an influential response to international insolvency law issues.

(c) This statement is untrue because of the requirement for reciprocity in relation to the Model Law on Cross-border Insolvency.

(d) This statement is true because the Model Law on Cross-border Insolvency creates regulations which binds each State and has been the most influential response to international insolvency law issues.

Question 1.10

Opponents of universalism often argue that universalism is difficult to achieve because of the effects of globalisation. Select from the following the **best response** to this statement:

(a) This statement is untrue because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

(b) This statement is untrue because universalism corresponds well to globalisation and opponents of universalism are more concerned with the impacts of universalism upon domestic markets.

(c) This statement is true because globalisation makes the principle of universalism redundant.

(d) This statement is true because modified universalism enables a "main proceeding" to be opened in the State where the centre of main interests has been determined, while being supported by secondary or ancillary proceedings in another State.

Marks awarded 9 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Briefly discuss and compare countries whose insolvency law systems have historical roots in civil law with countries whose insolvency law systems have historical roots in English law.

Civil law has its roots in Roman Law. Roman law had elements of insolvency law in procedures which provided for assignment of property, liquidation of assets and arrangements with creditors, and which evolved from individual to collective processes of debt collection. Currently, countries with insolvency systems that have historical roots in civil law are mainly those with historical linkages (e.g., by way of colonization) with European countries which themselves have civil law systems such as France, Germany, Spain, Portugal and Netherlands.

English law has its roots in England and Wales. Similar to civil law, English Insolvency law first developed individual debt collection measures before collective measures emerged. Concepts such as supervision, examination and discharge followed subsequently. Currently, countries with insolvency systems that have historical roots in English law are mainly those with historical linkages (e.g., by way of colonization) with England. **Elaboration with respect to these countries is warranted**

Comparatively, countries with insolvency systems that have historical roots in English law refer to both written laws and superior court pronouncements - binding precedents under the doctrine of *stare decisis*- for applicable laws on insolvency, while countries with insolvency systems that have historical roots in civil law, primarily, rely on their written civil insolvency codes for applicable laws on insolvency - past court pronouncements are considered persuasive rather than binding under the doctrine of *Jurisprudence constante*. (Vincy Fon and Francesco Parisi, *"Judicial Precedents in Civil Law Systems: A Dynamic Analysis"*, American Law & Economics Association Annual Meetings, Paper 10, Page 3 – Page 5).

In the context of cross-borders insolvency, countries with insolvency systems that have historical roots in civil law are viewed as leaning towards territorialism while countries with insolvency systems that have historical roots in English common law are viewed as leaning towards universalism.

2.5

Question 2.2 [maximum 3 marks]

Briefly explain the difference(s) between the principle of universalism, the principle of modified universalism, and the principle of territorialism.

In the context of cross-border insolvency (i.e., an insolvent debtor with assets or creditors in more than one state) , Universalism is a principle that advocates for their being a single insolvency proceeding in respect of the insolvent debtor, with this insolvency proceeding being opened in the debtor's centre of interests (COMI), with the courts of state in which the debtor's centres of interests is located having exclusive jurisdiction in respect of these insolvency proceeding, and the insolvency laws of this state having exclusive application. Under universalism, all the assets and creditors of the debtor across the different states will be administered under this single insolvency proceeding.

On the other hand, Territorialism is a principle that advocates for their being concurrent/separate insolvency proceedings in each of the states where an insolvent debtor has interests (i.e., assets/liabilities), with the effect of each of the insolvency proceedings being restricted to within the respective state it is opened in – i.e., each state will have its own insolvency proceedings in respect of the debtor, with such proceedings being restricted to creditors and assets that are within that specific

jurisdiction. The courts of each state would have exclusive jurisdiction over the proceedings in their state and the laws of that state will apply to the insolvency proceedings.

Modified universalism is a principle under which advocates for a single "main proceeding" being opened where the debtor has its centre of interests and for secondary/ancillary proceedings to be opened in the other states where the debtor has interests (assets/liabilities) with the courts and insolvency representatives administering/acting in the main and secondary/ancillary proceedings cooperating with each other. This principle is an attempt at addressing some of the shortcomings of Universalism, such as, difficulty in establishing a single state which should be regarded as being the debtor's centre of interests.

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Question 2.3 [maximum 4 marks]

Briefly indicate initiatives undertaken to assist with the resolution of international insolvency issues in Latin America and discuss the differences between those initiatives.

Latin America has 3 different treaties, amongst different states, that include provisions aimed at addressing cross-borders insolvency issues, namely, The Montevideo Treaties of 1889 and 1940, and the Havana Convention on Private International Law of 1928 (Bustamante Code) (which includes both Latin and Middle American Countries).

The treaties have different signatories with The Montevideo Treaty of 1889 having 6 signatories, The Montevideo Treaty of 1940 having 3 signatories (from within the 6 signatories of The Montevideo Treaty of 1889) and the Havana Convention on Private International Law of 1928 having 15 Signatories (of whom (i) only 2 were signatories to The Montevideo Treaty of 1889, and (ii) none were signatories to The Montevideo Treaty of 1940).

Both the Montevideo Treaties and Bustamante Code were in favour of a single proceedings in respect of a debtor even in instances where the debtor had presence or interests in more than one jurisdiction, and accommodative of the idea of concurrent proceedings where the debtor had autonomous/economically separate operating units in different states.

The Montevideo Treaties were clear in their favour for the Doctrine of Domicile (Commercial domicile or centre of main interest of a Debtor), while the Bustamante Code was silent on the applicability of the Doctrines of Domicile or Nationality (Place of Incorporation of a Debtor). ("The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940)" by Ana Delić, Oxford Public International Law, https://opil.ouplaw.com/page/530, Monday, 13 November 2023, 12:15PM EAT).

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Marks awarded 9.5 out of 10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

It is said that the terms "bankruptcy" and "insolvency" may be used interchangeably. Discuss whether or not you agree with this statement, and why or why not. In your answer take care to include a discussion regarding: (i) what meaning may be ascribed to "bankruptcy" and "insolvency", (ii) the essential characteristics of "bankruptcy" and "insolvency" and (iii) any differences that may arise when a "bankruptcy" / "insolvency" involves a corporation rather than an individual.

"Bankruptcy" and "Insolvency" should not be used interchangeably, particularly, in communication to a diverse (by State) audience. This is because while some systems use the terms interchangeably, others use them to refer to different things. For example, some jurisdictions like Australia and Kenya use "Bankruptcy" to refer to the insolvency of Natural Persons/Individuals and "Insolvency" to refer to the insolvency of corporations. A slightly different, but equally differentiated use of the terms, is where some systems use the term "Insolvency" to refer to the state of the debtor's affairs (i.e., inability to pay debts as and when they fall due or liabilities exceed assets) and use the term "Bankruptcy" to refer to a situation where insolvency proceedings have commenced in relation to the debtor. Considering the terms do not have an accepted universal meaning, they should not be used interchangeably.

Some of the essential characteristics of a "bankruptcy" and "insolvency" are:

a. Inability of the debtor to pay their debts as and when they become due OR the debtor's liabilities exceeding their assets;
b. Suspension of "unilateral" enforcement action by creditors after commencement of bankruptcy/insolvency procedures. This is because the procedures are collective enforcement action that is intended to address the satisfaction of the debts of all creditors in line with applicable laws.
c. Pooling of assets of the insolvent debtor to satisfy creditor debts in line with applicable waterfalls;
d. *Pari Passu* payment of creditors that rank equally under the statutory/insolvency waterfall;
e. Investigation of root causes of the insolvency/failure; and
f. Voidance of any transactions where it can be satisfactorily demonstrated that the insolvent debtor dealt with assets in an improper manner, say, by giving preferences to specific creditors or transferring assets at undervalue, thereby, occasioning loss of value to the estate.

Key differences between "bankruptcy"/"insolvency" of individuals and corporations are that:

a. Whereas the insolvency of a corporation can result in its liquidation (i.e., ceasing to exist and being struck off the register of companies), the insolvency of an individual does not result in the individual ceasing to exist;
b. While the insolvency of individuals often includes the concept of "excluded assets" (i.e., assets that are not considered part of the insolvent estate and which are, therefore, not available for application in satisfying creditor claims), insolvency of corporations usually does not include such a concept, with the standard practice being that all the assets of the corporation are available to be applied towards satisfaction of either specific or general claims against the corporation; and
c. Usually, the primary objective of insolvency proceedings against individual debtors is to protect the debtors from harassment by their creditors and to accord them the opportunity for a fresh start (i.e., discharge). On the other hand, the primary objective of insolvency proceedings against a corporation is, to the extent possible, preserve whole or part of the business of the insolvent debtor, under the same or other Company, and to satisfy the claims of the creditors of the debtor in whole or in part out of the assets of the debtor, taking appropriate action against officers of the debtor company who may have, by virtue of their actions or inactions, exposed themselves to personal liability in the period leading to or after commencement of the insolvency.

Take care to reference the relevant authors/ authorities where appropriate, eg Sealy and Hooley

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Question 3.2 [maximum 5 marks]

Discuss some of the challenges which arise in cross-border insolvency that make it difficult to develop a single global cross-border insolvency dispensation.

Some of the challenges that arise in cross-border insolvency and that make it difficult to develop a single global cross-border insolvency dispensation include:

a. Varying thresholds/definitions of insolvency across jurisdictions – There is no globally accepted definition/threshold for insolvency with reference to either cash flows or net assets. This poses the risk that a corporation that may be considered insolvent in one jurisdiction may be considered solvent in another jurisdiction. This risk is heightened where jurisdictions adopt a territorial approach to insolvency which further distorts/complicates the measurement of cash flows/net assets of a debtor for purposes of assessing solvency;

b. Varying policy considerations in relation to insolvency – while some states have pro-creditor insolvency systems (i.e., exhibiting conservative approach to discharge of insolvent debtors), other states have pro-debtor insolvency systems (i.e., exhibiting liberal approach to discharge of insolvent debtors). This can create conflict of objectives in any proposed cross-border insolvency laws where the pro-debtor jurisdictions may be in favour of reorganization/Business Rescue procedures while the pro-creditor jurisdictions may be is in favour of liquidation-type procedures;

c. Differences in other Substantive Domestic Laws (over and above the Insolvency-specific Laws) – Insolvency laws are greatly influenced by other substantive laws of a country, such as laws relating to Taking of Securities and means of Conveying Title, as well as other provisions of protecting title and value available to creditors such as set-off and netting arrangements, retention of title etc. Material differences in Substantive Laws across jurisdictions pose a significant challenge to harmonization of cross-border insolvency dispensations since the cross-border insolvency dispensations would also be dependent on and influenced by domestic Substantive Laws. More broadly, material differences across substantive and procedural law aspects of civil and common law regimes pose a significant challenge to global harmonization;

d. Differences in other fiscal and socio-political policy considerations may also create difficulties in attempts to create a single cross-border insolvency dispensation. For example, some governments will take a protectionist stance (i.e., choose to protect local creditors at the expense of foreign creditors/stakeholders) for political capital. This is also true for differences in other socio-economic policies across states, e.g., protectionist approach to labour rights and varying priority/preferential claims in insolvencies etc. To the extent different states have different socio-political priorities, harmonization of cross-border insolvency laws will remain challenged; and

e. Difficulty in identifying or agreeing on Centres of Main Interest for businesses. This challenge is, particularly, amplified in the case of group corporations. States have different views on relevant doctrines such as Doctrines of Domicile and Nationality. Creating harmonized dispensation for cross-border insolvency will remain challenged to the extent divergence exists in relation to core principles such as identification of the debtor's COMI, and concern about inherent risks of the COMI principle, such as forum shopping, persist.

It would be beneficial for you to also consider the matters raised by Omar and Westbrook 2

Question 3.3 [maximum 3 marks]

Briefly discuss what is meant by "hard law" and what is meant by "soft law" in the context of international insolvency. In your answer you should also provide examples and discuss the varying success of "hard" and "soft" laws in providing solutions to the challenges of international insolvency.

Generally, "Hard Law" refers to binding laws which impose legal obligations that are capable of being enforced before a court of law. (https://www.ecchr.eu/en/glossary/hard-law-soft-law/, 13 November 2023, 14.45PM). In the context of international insolvency, "Hard Law" refers to treaties and conventions, touching on the administration of cross-border insolvencies, which states become parties/signatories to, giving them legal effect under their own domestic laws. Examples of "Hard Laws" relating to international insolvencies include the Montevideo Treaties and the Bustamante Code (Latin America), the EIR Recast 2015 (Europe) and the Nordic Convention of 1933 (Scandinavian countries). "Hard Laws" on International Insolvency have been hard to agree on. However, where states have managed to find common ground and enter into such multilateral agreements, the agreements have promoted the efficient and effective management of cross-border insolvencies relating to the states that are party to the same agreements. The successful adoption and implementation of "Hard Laws" has, however, been restricted to regional blocks, with little to no global influence.

On the other hand, "Soft Law" generally refers to agreements, principles or declarations that are not legally binding(https://www.ecchr.eu/en/glossary/hard-law-soft-law/, 13 November 2023, 14.45PM). In the context of international insolvency, "Soft Law" refers to instruments on international insolvency law developed by multilateral bodies with a view to promoting greater efficiency in resolution of international insolvency matters by promoting approaches such as harmonization of domestic insolvency laws, uniform choice of law principles, uniform recognition laws and co-operation and coordination in recognition and enforcement. Examples of "Soft Law" on international Insolvency include the UNCITRAL Model Law on Cross-border Insolvency (1997) and the ALI-NAFTA Guidelines Applicable to Court-to-Court Communications in Cross Border Cases (2000). "Soft Laws" have had greater success in promoting resolution of issues that arise in the context of international insolvencies because some of the "Soft Laws", such as the UNCITRAL Model Law on Cross-border Insolvency, have been adopted quite widely across the globe going beyond the regional borders that most "Hard Laws" have. With more and more countries adopting similar (model) laws in relation to cross-border insolvencies, there is increasing certainty on the conduct of cross-border insolvencies and the resolution of issues that arise.

3

Marks awarded 11 out of 15

QUESTION 4 (fact-based application-type question) [15 marks in total]

Norton Cars Inc is a registered company that manufactures sports cars. The company was initially incorporated in the USA and at the time operated from there. The company's main place of business as well as its headquarters were later moved to Nottingham (England), but the COMI then moved to Italy when the UK exited the European Union.

Norton Cars Inc maintains a presence and conducts business in the USA as well as various European countries, being countries which are both EU member states and non-member states.

Apart from the USA and various European states, Norton Cars Inc also distributes its cars to India, South Africa and Australia via branches of the company operating in these States.

A subsidiary of the company, Gladiator Manufacturing Ltd, manufactures and provides the engines for the sports cars in Germany.

Due to a worldwide recession, Norton Cars Inc is struggling financially due to little interest in the sports car market amongst consumers.

Question 4.1 [Maximum 4 marks]

For purposes of this part of the questions, assume Norton Cars Inc has filed for liquidation in terms of American law at the time when the headquarters were still in England.

Advise the American insolvent estate representative as to the applicable English cross-border source(s) that she may use to request recognition in terms of English Law in order to deal with the assets of Norton Cars Inc situated in England.

The American Bankruptcy Trustee should consider applying to the UK Courts for recognition under Article 9 (Right of direct access) and Article 15 (Application for recognition of a foreign proceeding) of Schedule 1 (UNCITRAL Model Law On Cross-Border Insolvency) of The Cross-Border Insolvency Regulations (2006) (https://www.legislation.gov.uk/uksi/2006/1030/schedule/1/, 13 November 2023, 22:02PM EAT) which allow a foreign representative to apply directly to a court in the UK (Article 9) and more specifically, to apply for recognition of foreign proceedings (Article 15).

This application can be buttressed with references to the common law position that UK courts have powers to assist foreign insolvency proceedings (universalism or modified universalism), as determined by various case law.

It would be beneficial to note that S 426 is not applicable as the US is not designated and to briefly consider common law.

2.5

Question 4.2 [Maximum 4 marks]

For purposes of this part question assume that Norton Cars Inc shifted its COMI to Italy when England exited the EU. At the same time, its main operations transpired in Germany, but its management was directed from Italy.

Advise as to the appropriate legal source(s) to be used in a cross-border insolvency matter between Italy and Germany, and also explain in which country the main proceeding should be opened in terms of applicable law.

The appropriate legal source(s) to use in a cross-border insolvency matter between Italy and Germany are the EU (Recast) Insolvency Regulation (to guide on which jurisdiction's insolvency regime ought to apply in the case) and the Italian Crisis and Insolvency Code.

The main proceedings should be opened in Italy which, under the EU (Recast) Insolvency Regulation, is the Company's COMI. The EU (Recast) Insolvency Regulation defines COMI as the "place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". The Company's COMI and Administrative Headquarters are in Italy. (Paragraph 1, Article 3 - International Jurisdiction, Regulation (EU) 2015/848 Of The European Parliament And Of The Council, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848, 13 November 2023, 22:37PM)

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Question 4.3 [Maximum 1 mark]

Will an Indian, South African or Australian court be eligible to apply the EU (Recast) Insolvency Regulation when considering the recognition of an EU insolvency representative duly appointed in terms of the EU regulation?

No. The EU (Recast) Insolvency Regulation is relevant only for EU Member States.

1

Question 4.4 [Maximum 6 marks]

For purposes of this part question assume that an insolvency procedure has been opened in terms of Italian law and an Italian insolvent estate representative has been appointed. The representative discovers assets of the insolvent company, Norton Cars Inc, in the Netherlands and Australia where the company is operating through external branches of the company respectively, but such assets are subject to real rights of security established in terms of Dutch and Australian law respectively.

(a) Which law will apply to the insolvency proceeding and with regard to the real rights of security situated in the Netherlands? (This question (a) is worth 3 marks out of the available 6 marks.)

The Dutch Bankruptcy Act will apply in relation to proceedings and securities located in the Netherlands. This is because the EU (Recast) Insolvency Regulations recognize the difference in substantive laws across the member states and provides that security rights be determined according to *lex situs* and that they should not be affected by the commencement of insolvency proceedings (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R0848, Paragraph 68, 13 November 2023, 22:59PM.

3

(b) Which law will apply with regards to an insolvency proceeding in Australia and the real rights of security situated in there? (This question (b) is worth 3 marks out of the available 6 marks.)

The Corporations Act (2001) and the Cross-Border Insolvency Act (2008) of Australia will be applicable. The rights of secured creditors are not affected by recognition granted to foreign proceedings under the Cross-Border Insolvency Act – Australian insolvency law generally, even in the context of other types of domestic insolvency matters, preserves the rights of secured creditors (https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/julie-soars-2015)

3

Marks awarded 13.5 out of 15

*** End of Assessment ***

TOTAL MARKS AWARDED 43/50

An excellent paper - a thorough response that addresses the questions asked and substantiates the answers well.